

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF APPLICATION  
NO. S3-21379 FOR PERMIT TO  
APPROPRIATE PUBLIC WATERS

JOHN A. DRIVER,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 792

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

THIS MATTER being an appeal of the denial of a surface water appropriation permit; having come on regularly for hearing before the Pollution Control Hearings Board on the 8th day of May, 1975, at Spokane, Washington; and appellant, John A. Driver, appearing pro se and respondent, Department of Ecology, appearing through Wick Dufford, assistant attorney general; and Board members present at the hearing being Chris Smith, presiding officer, and Walt Woodward and the Board having considered the sworn testimony, exhibits, records and files herein and arguments

1 of the parties and having entered on the 22nd day of May, 1975, its  
2 proposed Findings of Fact, Conclusions of Law and Order, and the Board  
3 having served said proposed Findings, Conclusions and Order upon all  
4 parties herein by certified mail, return receipt requested and twenty  
5 days having elapsed from said service; and

6 The Board having received no exceptions to said proposed Findings,  
7 Conclusions and Order; and the Board being fully advised in the premises;  
8 now therefore,

9 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said proposed  
10 Findings of Fact, Conclusions of Law and Order, dated the 22nd day of  
11 May, 1975, and incorporated by this reference herein and attached hereto  
12 as Exhibit A, are adopted and hereby entered as the Board's Final  
13 Findings of Fact, Conclusions of Law and Order herein.

14 DONE at Lacey, Washington, this 1st day of July, 1975.

15 POLLUTION CONTROL HEARINGS BOARD

16 Chris Smith  
17 CHRIS SMITH, Chairman

18 Walt Woodward  
19 WALT WOODWARD, Member  
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21  
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23  
24  
25

26 FINAL FINDINGS OF FACT,  
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CERTIFICATION OF MAILING

I, LaRene Barlin, certify that I deposited in the United States mail, copies of the foregoing document on the 1<sup>st</sup> day of July, 1975, to each of the following-named parties, at the last known post office addresses, with the proper postage affixed to the respective envelopes:

Mr. John A. Driver  
Route 4, Box 111  
Newport, Washington 99156

Mr. Wick Dufford  
Assistant Attorney General  
Department of Ecology  
St. Martin's College  
Olympia, Washington 98504

  
LARENE BARLIN  
POLLUTION CONTROL HEARINGS BOARD

FINAL FINDINGS OF FACT,  
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STATE OF WASHINGTON

IN THE MATTER OF APPLICATION )  
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JOHN A. DRIVER, )  
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STATE OF WASHINGTON, )  
DEPARTMENT OF ECOLOGY, )  
Respondent. )

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FINDINGS OF FACT,  
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This matter, the appeal of the denial of a surface water appropriatio  
permit, came before the Pollution Control Hearings Board (Chris Smith,  
presiding officer, and Walt Woodward) at a formal hearing in the conferenc  
room of the Spokane County Juvenile Parole office, on May 8, 1975.

Appellant appeared pro se; respondent appeared through Wick Dufford,  
assistant attorney general. Ed Carr, Spokane court reporter, recorded  
the proceedings.

Witnesses were sworn and testified. Exhibits were admitted. Closing

EXHIBIT A

1 arguments were made.

2 From testimony heard, exhibits examined and arguments considered, the  
3 Pollution Control Hearings Board makes these

4 FINDINGS OF FACT

5 I.

6 Since 1950, appellant has operated a farm on the banks of Skookum  
7 Creek, a tributary to the Pend Oreille River, in Pend Oreille County near  
8 Newport. He holds a surface water appropriation certificate for the  
9 withdrawal of 0.5 cubic foot per second (cfs) with which he irrigates  
10 about 70 acres of land.

11 Having had alfalfa crops on a larger acreage (a total of 200 acres)  
12 "dry out" for three consecutive years for lack of sufficient moisture,  
13 appellant, on July 3, 1973, filed with respondent Application S3-21379 for  
14 the right to withdraw an additional 0.5 cfs from Skookum Creek for  
15 irrigation purposes.

16 II.

17 Respondent denied the application on December 24, 1974. That denial  
18 is the subject of this appeal.

19 III.

20 On August 24, 1967, both the Department of Game and Department of  
21 Fisheries recommended to respondent that Skookum Creek be closed to all  
22 future consumptive water withdrawals because of possible material damage  
23 to the creek's trout fishery.

24 IV.

25 Respondent, making its own investigation of Skookum Creek, adopted  
the Game and Fisheries recommendation. Since 1967, respondent has approved

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1 only nine surface water withdrawals from Skookum Creek for domestic  
2 purposes, the largest being 0.02 cfs. Respondent does not regard domestic  
3 use as a "consumptive" withdrawal. Since 1967, respondent has denied all  
4 irrigation withdrawal applications on Skookum Creek, including one from  
5 another state agency, the Department of Natural Resources, for irrigation  
6 of 50 acres.

7 V.

8 Prior to the 1967 "closure" of Skookum Creek to consumptive water  
9 withdrawals, respondent and its predecessor agencies had issued  
10 irrigation withdrawal certificates in the Skookum Creek drainage basin  
11 totaling 15.79 cfs for 920 acres. Some of these valid certificates are  
12 not being fully utilized. However, if all of the existing valid water  
13 rights to Skookum Creek were to be exercised at one time, it would result  
14 in the creek going dry in periods of late summer low flow.

15 VI.

16 Current field examination of Skookum Creek by the Department of  
17 Game shows that Skookum Creek still supports a good trout fishery and  
18 further contributes, by providing a viable spawning area, to the larger  
19 sport fishery in the Pend Oreille River.

20 VII.

21 Flow data available on Skookum Creek is minimal but United States  
22 Geological Survey measurements show that in August, 1971, the flow  
23 dropped to 5.75 cfs and to 6.94 cfs in September, 1972.

24 VIII.

25 A flow below 8 cfs would be detrimental to the trout fishery in  
26 Skookum Creek because of the loss, due to dryness, of littoral areas

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where fish food organisms grow.

IX.

Any Conclusion of Law hereinafter stated which is deemed to be a Finding of Fact is adopted herewith as same.

From these Findings, the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

I.

Any water withdrawal application, pursuant to RCW 90.03.290, must meet the tests of beneficial use, water availability, existing rights and public welfare. Since 1971, RCW 90.54.020 also has required that respondent maintain a minimum flow which will meet certain demands of esthetics, wildlife and fish.

II.

Appellant's growing of alfalfa would be a beneficial use of the waters of Skookum Creek.

III.

Since 1967, there has been no water available in Skookum Creek for consumptive (irrigation) withdrawals by virtue of the unanimous decision of the Departments of Game, Fisheries and Ecology to close the creek to such withdrawals. That decision, made by respondent upon its own investigation after recommendation by the other two departments, was neither arbitrary nor capricious.

IV.

Appellant's application, if granted, would impair existing rights which, if totally and simultaneously exercised, would dry up the creek.

FINDINGS OF FACT,  
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1 For a similar reason, appellant's application, if granted, would be  
2 detrimental to public welfare.

3 V.

4 Current field examination by the Department of Game substantiates  
5 that the granting of appellant's application would be inconsistent with  
6 the minimum flow provision for fish in RCW 90.54.020.

7 VI.

8 Appellant has failed in all but one of the tests outlined in  
9 Conclusion I and, therefore, respondent's denial of appellant's applicatio  
10 must be sustained.

11 VII.

12 Any Finding of Fact herein which is deemed to be a Conclusion of  
13 Law is adopted herewith as same.

14 Therefore, the Pollution Control Hearings Board issues this

15 ORDER

16 The appeal is denied and respondent's denial of Application S3-21379  
17 is sustained.

18 DONE at Lacey, Washington this 22nd day of May, 1975.

19 POLLUTION CONTROL HEARINGS BOARD

20 Chris Smith  
21 CHRIS SMITH, Chairman

22 Walt Woodward  
23 WALT WOODWARD, Member

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25  
26  
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